UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
EXECUTIVE SECRETARY

Noemí Merced Petitioner Unión de Periodistas, Artes Gráficas y Ramas Anexas, Local33225 (UPAGRA) Union Publi-Inversiones de Puerto Rico D/B/A El Vocero Employer NATIONAL LABOR RELATIONS BOARD SUBREGION 24	Case 12-RD-221192 PETITIONER'S REQUEST FOR REVIEW

REQUEST FOR REVIEW

TO THE HONORABLE NATIONAL RELATIONS BOARD:

NOW COMES petitioner, Noemí Merced, through the undersigning legal representation, and respectfully states, requests and prays:

I. INTRODUCTION

On March 30, 2018 the United States Court of Appeals, for The District of Columbia Circuit, entered Judgment in Case No/ 17-1102, *Publi-Inversiones de Puerto Rico, Inc., d/b/a El Vocero de Puerto Rico (Petitioner)* v. *National Labor Relations Board,(Respondent),* F. 3d 142 (2018) denying the Petition for Review and granting the cross-application for enforcement of an order of the National Labor Relations Board given in *Publi-Inversiones de Puerto Rico, Inc., d/b/a El Vocero de*

Puerto Rico, 365 NLRB No. 29 (2017), as modified by 365 NLRB No. 65 (2017). The court confirmed the National Labor Board's decision, which concluded that Publi-Inversiones is the successor employer to the newspaper's previous owner, Caribbean International News Corporation, d/b/a El Vocero de Puerto Rico, Inc.; and thus violated the law by refusing to acknowledge th Union as the representative of the employees; and, failing to recognize the Union as the labor representative of the employees; and, refusing to bargain collectively with the Union as the exclusive collective-bargaining representative of the employees.

The now affirmed NLRB Order required the employer to bargain with the Union, in regards to: wages; pay rate; working hours; among other issues involving conditions of employment of the employees at El Vocero and the employer-employee relations. Publi-Inversiones notified employees of said decision on April 17, 2018, and dates were set to start bargaining with the Union.

On May 31, 2018, petitioner Noemí Merced filed a petition or request for decertification (RD) of the collective-bargaining representative of the employees at her workplace, El Vocero de Puerto Rico, one of the two main newspapers in Puerto Rico, owned and operated by Publi-Inversiones de Puerto Rico, Inc. (*hereinafter*, El Vocero or the Employer or Publi-Inversiones). The collective-bargaining representative is Unión de Periodistas, Artes Gráficas y Ramas Anexas, Local33225 (*hereinafter* UPAGRA or the Union). It must be noted that even though she appears as the named petitioner by herself, it was filed in the name of herself and the other twenty-nine (29) union member employees, who signed the letter stating their desire for decertification of UPAGRA as their representative, from May 29-31, 2018, which was included with the petition. Said number signees, not only surpass the thirty percent (30%) of union member employees, but represent more than seventy percent (70%) of all union member employees.

On June 12, 2018, twelve (12) days after the filing of the RD, the Region dismissed the Petition without hearing; without asking for further arguments; opportunity to show cause or provide evidence; without adequate explanation; without the benefit of elections; and without providing a remedy to the thirty (30) signees of the petition letter who do not feel represented by UPAGRA and do not want UPAGRA to represent them. The decision was signed by Vanessa García, Officer in Charge, in place of Regional Director, David Cohen, and it stated "as a result of the investigation, I find that further proceedings are not warranted". The "reasons" given were:

> "The court decree enforced the Board's conclusions that the Employer, as a successor employer to Caribbean International News Corporation, d/b/a El Vocero de Puerto Rico, Inc., violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of the above-described unit of employees, and by failing and refusing to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Employer's unit employees. The enforced Board Order requires the Employer, to bargain with the Union with respect to rates of pay, wages, hours and other terms and conditions of employment of the employees in the above unit and, if an understanding is reached, embody such understanding in a signed agreement; to provide the Union with requested information; and to post a remedial Notice to Employees for 60 days. The Employer has certified to the Regional Office that it posted the Notice to Employees on April 17, 2018, and provided the Union with requested information on May 2, 2018. On May 2, 2018, the Employer further certified that it was scheduled to start bargaining with the Union on May 14, 2018."

Since the case was dismissed without hearing and without receiving evidence or testimonies, the Executive Secretary of the Board is in the same position as the Regional Director to review this case.

II. MATERIAL AND PROCEDURAL FACTS

1. Petitioner Noemí Merced as well as the other twenty nine (29) signees of the "petition letter", are all employees of El Vocero and members of UPAGRA.

2. The Petition was supported by 30 out of 41 union member employees at the referred bargaining unit, which accounts for around seventy three percent (73%) of the bargaining unit.

3. The petition letter states that all signees want to express that they do not desire to continue with the present union or bargaining representative in negotiations or bargaining process or any other matter related to employee representation with the employer. And specifically it clearly states that they do not want to be represented by UPAGRA.

4. On May 31, 2018, the same day the Petition was filed, the National Labor Relations Board set the date of the election regarding decertification, for June 21, 2018,[1] and a Notice for Representation Hearing was entered and notified, setting said Hearing for June 8, 2018.

5. On June 1st, 2018, the employer notified employees with the corresponding Notice of Petition for Election, sent by the National Labor Relations Board, Sub-region 24, on that date.

6. On June 6, 2018, at 11:41 AM, Field Examiner Cliff Ramos, notified via e-mail, that "the Region was planning to send parties a 'Notice to Show Cause' so they could explain why further processing of the petition should be granted", going on to notify that the June 8, 2018 hearing was "held in abeyance pending a determination", after getting the responses to the planned Notice to Show Cause.

7. On that same day, but in the early afternoon, the Field Examiner called the petitioner to persuade her to file a voluntary request for dismissal without prejudice, because if she didn't the Region would proceed to dismiss it. He gave her until 3 PM of the next day, June 7, to notify her decision.

8. On the morning of June 7, the Field Examiner reiterated his request, *via* phone, even

[1]Dependent on the success of the Petition.

though it contradicted the June 6 e-mail communication and all the previous acts by the Region regarding the Petition.

9. On the afternoon of June 7, petitioner's legal representative informed the Field Examiner, that petitioner **would not** file or ask for a voluntary dismissal.

10. Contrary to what was informed, the Notice to Show Cause, never arrived before de June 7, 5 PM deadline the Field Examiner had set. It did not arrive on June 8 or June 11 either.

11. On June 12, 2018, the Region notified its decision, dismissing the captioned case, regarding the request for decertification filed by the petitioner.

12. Since the March 30, 2018 judgment, the subsequent commencement of the bargaining negotiations with Publi-Inversiones and up until the filing of the Petition, there was no effort from the Union to gather or assemble all the bargaining unit employees or communicate the goals, strategies and methods for the negotiations, nor were the members consulted in regards to their wants and needs as employees at El Vocero, for the mandated negotiations.

13. Petitioner and signees do not want to be represented by UPAGRA; do not feel represented by UPAGRA; and, do not feel that their interests are being represented or taken into account.

14. Negotiations between Employer and the Union were set to begin on May 14, 2018.

III. ARGUMENT

This case is factually simple: the employees of El Vocero, which is now a rather small bargaining unit of newspaper workers, no longer wish to be represented by the Union and submitted a Petition to the NLRB to vindicate their rights. In three (3) days more than seventy percent (70%) of the unit workers showed interest and freely and voluntarily signed the petition letter clearly

expressing their desire to not be represented by the Union in bargaining negotiations with the employer nor in any matter related to labor relations. However, they have been thwarted by the Region from exercising their right to choose and/or refuse their exclusive bargaining representative.

Those facts motivated the filing of the RD on May 31, 2018. Unfortunately the Region dismissed the Petition without any further process or inquiry. Even though the decision expresses that it was arrived at "[a]s a result of the investigation", the evidence proves otherwise. Not only was there no investigation, but the Region clearly reversed the course they originally set and decided to act in direct opposition with the said course. They went from ordering a hearing and setting an election date pending their decision; to announcing that they would hold the hearing in abeyance because they planned to notify in the near future a notice to the parties to show cause, while at the same time trying to persuade the petitioner to ask for voluntary dismissal; to in the end, simply dismissing the Petition without a hearing; without inquiries; without collecting evidence; without interviewing interested parties; and, without giving Petitioner the opportunity to show cause why the petition should not be dismissed.

One has to wonder, what changed from June 1st to June 6 in the morning to June 6 in the afternoon, to June 12, 2018? The one thing that we know did not change, was petitioner's will and desire to go through with de RD, despite the attempts from NLRB officers to persuade her otherwise.

Furthermore, after reading the June 12, 2018 Order dismissing the RD, we find that it really **does not express the reason**. The reason given, that "[t]he enforced Board Order requires the Employer, to bargain with the Union with respect to rates of pay, wages, hours and other terms and conditions of employment of the employees in the above unit and, if an understanding is reached, embody such understanding in a signed agreement; to provide the Union with requested information;

and to post a remedial Notice to Employees for 60 days.", **is not a reason to dismiss the RD**. The quoted text is only an affirmation that the NLRB ordered the Employer to bargain in good faith. That fact is undisputed. The issue in this case is: if said mandate prevents or bars employees from requesting decertification; in this case being a request co-signed by 73% of the bargaining unit. We firmly believe it does not and it certainly does not bar the Region from reviewing, processing and investigating the Petition instead of simply dismissing it before it even begins.

We believe that the failure of the Region to provide concrete and legal reasons and justifications for its haste course of action and dismissal, provide the Executive Secretary with grounds to revoke the de decision to dismiss.

However, even if a constructive reading of the Order leads the Executive Secretary to decide that the implicit reason for the dismissal is the application of the "successor bar doctrine", even though it is not cited or claimed, we still believe that it does not apply to the facts of this case and the Executive Secretary should still revoke de challenged Order to dismiss.

The National Labor Relations Board adopted or reinstated the "successor bar doctrine " in *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011). Said doctrine is a "Board-manufactured principle"[2] under which a union is conclusively presumed to retain its majority or representative status, even after the represented employees become employed by a successor employer. *UGL-UNICCO Service Co., supra.*

The "successor bar doctrine applies" in cases where the successor employer has recognized an incumbent union, or like in this case, has been ordered by mandate to recognize th union. The doctrine awards the incumbent union a reasonable period of time for collective bargaining with the

[2] *See*, Littler Mendelson, ASAP: A Timely Analysis of Legal Developments, (Sept. 2011)

successor employer. The reasonable period of time, although not set in stone, could range from six months to a year, measured from the date of the first bargaining meeting between the employer and the union. The doctrine states that during this "reasonable period of bargaining", an employer, an employee, or a rival union may not challenge the incumbent union's majority representative status. *Id.*

As we know **the above has not always been the law of the land**, as it has been adopted, changed, revoked, modified and reinstated by the NLRB through the years.[3]

The captioned case is not one of a successor bar doctrine implicitly applied to the employer or to a rival or usurping union; it is one where it has been presumably applied against employees; in particular to a Petitioner with a signed petition that includes more than 70% of the bargaining unit. When the "successor bar doctrine" is applied against employees, as the dismissal implicitly does, it must be evaluated case by case and the particularities of each case must be examined, since it directly clashes with Sections 7 and 9 of the National Labor Relations Act, 29 U.S.C. § 157-159.

Section 7 recognizes employees' "right to self-organization, to form, join or assist labor organizations, to bargain collectively **through representatives of their own choosing**, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection. . ." (Emphasis added).

Section 9 provides that employees may have "[r]epresentatives designated or selected for the purposes of collective bargaining **by the majority of the employees** in a unit appropriate for such

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[3]*See, Southern Moldings, Inc.*, 219 NLRB 119 (1975) (holding that a successor union had only a rebuttable presumption of continued majority status); *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999) (the Board adopted a different "successor bar doctrine", holding a successor union enjoyed an irrebuttable presumption of majority status for a "reasonable", yet undefined, period); *MV Transportation*, 337 NLRB 770 (2002) (reverting to the rebuttable presumption).

purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . .” (Emphasis added).

In the captioned case, since the Region dismissed the case on its face, it must be accepted as an undisputed fact that 30 out of 41 union eligible employees do not want UPAGRA to represent them and do not feel represented by them. That means that the rights granted to employees by Section 7, in regards to **the right to bargain collectively by a representative of their choosing**; and, by Section 9, in regards to the right to have **representatives for collective bargaining selected by the majority of employees**, are clearly being violated. To allow the dismissal without hearing or query and without allowing the Petitioner to present her allegations, evidence and arguments, like the Region did, is to consent to the violation of rights granted to employees by the National Labor Relations Act.

Given that it is a fact that said rights are being violated, the Executive Secretary must decide if the “successor bar doctrine” should be applied in this case and if its application in this case justifies or warrants the discussed violations. We believe the answer is no.

In *UGL-UNICCO Service Co.*, *supra.*, the NLRB stated that “whether to establish a ‘successor bar’ presents an important policy choice, a choice which . . . calls on the Board to consider the larger, sometimes competing goals of the statute.” 357 NLRB at 804. However, the implementation or use of the successor bar doctrine in this case would fail to accomplish this goal, because it would undermine the main pillar and principle of the National Labor Relations Act, the employee’s freedom of choice, in favor of an unwanted incumbent Union. The purpose of the NLRA **is not to defend unions, but to allow “voluntary unionism” and organizing.** *Pattern Makers’*

League of N. Am., 473 U.S. 95, 107 (1985). And in particular Section 7 protects employees' right to select **a union or representative of their choosing** or their decision, if they chose it, **not to be represented at all**. *Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001).

It is the "NLRA's core principle that a majority of employees should **be free to accept or reject union representation**", *Conair Corp. v. NLRB*, 721 F.2d 1355, 1381 (D.C. Cir. 1983) (Emphasis added); but, in the captioned case the dismissal implicitly imposing a "successor bar" to the employees, ignores the employees' **right to reject representation or to choose a representative of their liking**. *See also*, *NLRB v. B.A. Mullican Lumber & Mfg. Co.*, 535 F.3d 271, 284 (4th Cir. 2008) (because the NLRA protects employee's freedom of choice, the Board "may not appropriately seek a bargaining order . . . that it knows is contrary to the will of a majority of the employees").

In what the Executive Secretary should consider and treat as persuasive arguments, the Sixth and Seventh Circuits have consistently held that a union's presumption of majority support in a successor situation is ***rebuttable***, rather than ***irrebuttable* or conclusive**.[4] Said Courts have agreed that "[w]hen a successor employer recognizes a union which has been certified as the exclusive representative of employees of the predecessor employer for one year or more, there is a **rebuttable presumption only** that the union continues to have the support of a majority of the employees". *Landmark International Trucks*, 699 F.3d 815, 818-19 (Emphasis added).

This coincides the following Supreme Court expresions: "if the union has a ***rebuttable* presumption** of majority status, this status continues despite the change in employers" *Fall River*

[4]*Landmark International Trucks*, 699 F.3d 815 (6th Cir.) (The Court vacated the Board's institution of the successor bar doctrine); *Randall Division of Textron, Inc. v. NLRB*, 965 F.2d 141 (7th Cir. 1992) ("[g]enerally, a successor employer, like any other employer, may withdraw its recognition of a union at any time after one year from the union's original certification.").

Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987) (Emphasis added). Thirty (30) out of forty one (41) employees signing a petition letter clearly rebut and rebuff whatever majority presumption the Board or Region assigned. Yet, it must be noted that petitioner **is not asking for decertification based on a petition letter**, it is **asking for an election to be held** in wich the Union would have ample opporttunity to present its case to the employees, who subsequently would have the opportunitity to vote and choose who, if anyone, should represent them in their relationship with the employer.

Another problem with applying **the successor bar doctrine against employees** is that it ends up becoming a protector of unions against employees exercising freedom of choice and the rights granted to them by the NLRA. And that goes against the reason of existence of the NLRA and the NLRB. The NLRB cannot be an instrument of limiting employees' right to organize or chhose not to organize as well as infringing their right to be represented by a representative of their choosing.

Applying the successor bar doctrine to employees who have expressed as a majority that they do not whish to be represented by the incumbent union, **legitimizes a flawed assumption that employees cannot be trusted to make their own decisions** as to whether they want a union as an exclusive collective bargaining representative or not. *See MV Transportation*, 337 NLRB 341 (1999). Such a flawed assumption **will always lead to flawed justice**; which is what the Petitioner and signees received from the dismissal Order.

Employees should not be forced to accept working conditions negotiated by a union that does not represent them; employees should not have to pay dues to a union that they do not choose to support.

Finally it must be considered that this case is different from the discussed or cited above

regarding the "successor bar doctrine", because in the captioned case the bargaining unit is a newspaper; and not just a newspaper but one of the two main and most read newspapers in Puerto Rico. Therefore there are First Amendment considerations and concerns at hand, that are not present in other types of bargaining units. The refusal of the Regional Director to act upon a request for decertification by employees, results in an imposition of a labor and bargaining representative on the employees at El Vocero, which directly affect the labor relations between employee and employer and the policies that will be implemented in the newspaper; while infringing on the rights and freedoms of those who are called upon to keep the people informed. There can be no freedom of the press when the people attempting to exercise said freedom are denied the freedom of choice in their place of work; and are denied the freedom to choose to be represented or not be represented, or to choose who represents them when bargaining and negotiating with their employer.

Therefore, petitioner asks and prays the that the Executive Secretary reviews the challenged dismissal Order, otherwise the employees would be forced to continue filing petitions until an election is granted; all while the Employer and the Union meet to bargain and negotiate an agreement that will never be implemented. Why wait 6 months or a year to evaluate the petition, when 73% of employees ask for it today? Why wait six months or a year to celebrate an election that 73% of employees have requested? What is a bargaining representative whose authority is given by the Regional Director instead of by the employees they represent? What is a bargaining representative without the people they are called to represent? These are the questions that we pray that the Executive Secretary of the Board asks and answers.

IV. TEMPORARY REMEDIES

In order to maintain the status quo and make certain that the claims of the petitioner do not become moot, while her Request for Review is processed, we ask and pray:

(A) For a stay in the collective bargaining negotiations between the Employer and the Union; and,

(B) That no union dues are charged to employees until the captioned case is finalized; and, if the Petition is denied, that no union dues are charged during the bargaining process.[5]

V. CONCLUSION

Seventy three percent (73%) of the union employees at El Vocero have freely and voluntarily expressed their desire to not be represented by their current labor and bargaining representative, UPAGRA. The Petitioner has taken that expression and filed a request for decertification (RD) based on that democratic expression by the employees. The Regional Director refused to process and investigate the Petition or hear the arguments, opting to dismiss the case instead. If said decision is denied review, the employees will continue to be represented by a representative that they have decided they do not want and does not truly represent them.

WHEREFORE appearing party asks and prays that the Executive Secretary of the Board:

A) Grants the request for review of the decision notified by the Regional Board and proceeds to revoke the dismissal ordered by the Regional Director and instead **grants the Petition filed** for decertification of the bargaining representative and orders the corresponding election at the bargaining unit; or,

[5]At the present time no Union dues are being charged or collected.

B) In the alternative the Petitioner asks and prays that the dismissal be revoked and the case be sent back to the Region, to continue the regular and ordinary proceedings.

RESPECTFULLY SUBMITTED

In San Juan, Puerto Rico on this 25th day of June 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2018, a true and correct copy of the foregoing Request for Review was filed electronically with the Executive Secretary using the NLRB e-filing system, and copies were sent to the following parties via e-mail to:

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In San Juan, Puerto Rico on this 25th day of June 2018.

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